



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 355

[EPA-HQ-SFUND-2010-0586; FRL-9651-1]

RIN 2050-AF08

Emergency Planning and Notification; Emergency Planning and List of Extremely Hazardous Substances and Threshold Planning Quantities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA or the Agency) is taking final action to revise the manner for applying the threshold planning quantities (TPQs) for those extremely hazardous substances (EHSs) that are non-reactive solid chemicals in solution. This revision allows facilities subject to the Emergency Planning requirements that have a non-reactive solid EHS in solution, to first multiply the amount of the solid chemical in solution on-site by 0.2 before determining if this quantity equals or exceeds the lower published TPQ. This change is based on data that shows less potential for non-reactive solid chemicals in solution to remain airborne and dispersed beyond a facility's fence line in the event of an accidental release. Previously, EPA assumed that 100% of non-reactive solid chemicals in solution could become airborne and dispersed beyond the fenceline in the event of an accidental release.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-SFUND-2010-0586. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically <http://www.regulations.gov>/or in hard copy at the Superfund Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Superfund Docket is (202) 566-0276.

FOR FURTHER INFORMATION CONTACT: Kathy Franklin, Office of Emergency Management, Mail Code 5104A, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460-0002; telephone number: (202) 564-7987; fax number: (202) 564-2625; e-mail address: franklin.kathy@epa.gov You may also contact the Superfund, TRI, EPCRA, RMP and Oil Information Center at (800) 424-9346 or (703) 412-9810 (in the Washington DC metropolitan area). The Telecommunications Device for the Deaf (TDD) number is (800) 553-7672 or (703) 412-3323 (in the Washington, DC metropolitan area). You may wish to visit the Office of Emergency Management (OEM) Internet website at www.epa.gov/emergencies/content/epcra.

SUPPLEMENTARY INFORMATION: Here are the contents of today's preamble.

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I. General Information

A. Who is Affected by This Final Rule?

Entities that would be affected by this final rule are those organizations and facilities subject to section 302 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and its implementing regulations found in 40 CFR part 355, subpart B- Emergency Planning. To determine whether your facility is affected by this action, you should carefully examine the applicability provisions at 40 CFR part 355. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What is the Statutory Authority for This Final Rule?

This final rule is being issued under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), which was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499), (SARA). The Agency relies on EPCRA section 328 for general rulemaking authority.

C. List of Abbreviations and Acronyms

ARF – Airborne Release Fraction

CAS – Chemical Abstracts Service

CBI – Confidential Business Information

CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act

CFR – Code of Federal Regulations

EHS – Extremely Hazardous Substance

EO – Executive Order

EPA – Environmental Protection Agency

EMA – Emergency Management Agency

EPCRA – Emergency Planning and Community Right-to-Know Act of 1986

FR – Federal Register

HCS – Hazard Communication Standard

ICR – Information Collection Request

LEPC – Local Emergency Planning Committee

LOC – Level of Concern

MSDS – Material Safety Data Sheet

NFPA – National Fire Protection Association

NRC – National Response Center

NTTAA – National Technology Transfer and Advancement Act of 1995

OMB – Office of Management and Budget

OEM – Office of Emergency Management (within EPA)

D. What is the Background of This Final Rule?

Title III of SARA (EPCRA) establishes authorities for emergency planning and preparedness, emergency release notification reporting, community right-to-know reporting, and toxic chemical release reporting. It is intended to encourage state and local

planning for, and response to releases of hazardous substances and to provide the public, local governments, fire departments, and other emergency officials with information concerning potential chemical hazards present in their communities. The implementing regulations for emergency planning, emergency release notification, and the chemicals subject to these regulations are codified in 40 CFR part 355. The implementing regulations for community right-to-know reporting (or hazardous chemical reporting) are codified in 40 CFR part 370.

Subtitle A of EPCRA establishes the framework for local emergency planning. The statute requires that EPA publish a list of extremely hazardous substances (EHSs). The EHS list was established by EPA to identify chemical substances that could cause serious irreversible health effects from accidental releases (52 FR 13378, April 22, 1987). The Agency was also directed to establish a threshold planning quantity (TPQ) for each extremely hazardous substance.

Under EPCRA section 302, a facility that has an EHS on-site in excess of its TPQ must notify the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC), as well as participate in local emergency planning activities. Under EPCRA section 304, the facility owner or operator must report accidental releases of EHSs and hazardous substances listed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 40 CFR 302.4 in excess of the reportable quantity (RQ) to their LEPC and SERC, and to the National Response Center if the chemical is a CERCLA hazardous substance .

Under ECPRA sections 311 and 312, facilities that have either 1) a hazardous chemical present at or above 10,000 pounds or 2) an EHS present at or above its TPQ or

500 pounds- whichever is the lesser, are required to submit an Emergency and Hazardous Chemical Inventory form and a Material Safety Data Sheet (MSDS) for that chemical to their SERC, LEPC and local fire department. A chemical is hazardous as defined under the Hazard Communication Standard (HCS) of the Occupational Safety and Health Act (OSHA).

In a July 26, 1990 Federal Register notice (55 FR 30632), EPA added definitions necessary to designate Indian Tribes as the implementing authority of the emergency planning reporting and notification requirements and hazardous inventory reporting requirements. Under 40 CFR 355.61 and 40 CFR 370.66, when a facility is located in Indian Country, SERC means the Emergency Response Commission for the Tribe under whose jurisdiction the tribe is located. Such a Tribal Emergency Response Commission is known as a TERC.

The purpose of the EHSs list is to focus initial efforts in the development of state and local contingency plans. Inclusion of a chemical on the EHSs list does not mean state or local communities should ban or otherwise restrict use of a listed chemical. Rather, such identification indicates a need for the community to undertake a program to investigate and evaluate the potential for accidental exposure associated with the production, storage or handling of the chemical at a particular site and develop a chemical emergency response plan around those risks.

1. Regulatory Background

The list of EHSs and their TPQs are codified in 40 CFR part 355, Appendices A and B. EPA first published the EHSs list and corresponding TPQs along with the methodology for determining the TPQs as an interim final rule on November 17, 1986

(51 FR 41570). In the final rule of April 22, 1987 (52 FR 13378), EPA made a number of revisions. Among other things, the final rule republished the EHSs list, added four new chemicals, and revised the methodology for some TPQs. The final rule also defined TPQs for EHS solids in solution, based on comments on the interim final rule. Details of the methodology used in determining whether to list a substance as an EHS and deriving the TPQs are found in the November 1986 and April 1987 Federal Register notices and in the technical support documents,¹ all found in the docket for this rulemaking.

2. Development of Existing TPQs

The TPQs were initially assigned based on a ranking scheme using a Level of Concern (LOC) based on acute toxicity and the potential for airborne dispersion. The TPQ methodology is described in detail in the “Threshold Planning Quantities Technical Support Document” dated April 7, 1987, which can be found in the docket for this rulemaking. For each chemical, a ranking index was calculated which equaled the LOC divided by an air dispersion factor (V). Chemicals were assigned TPQs of 1, 10, 100, 500, 1000 or 10,000 pounds based on the order of magnitude ranges of the index values. For gases, $V = 1$, while for liquids, V was based on a volatilization model using the molecular weight and boiling point of the chemical.

Solid EHS chemicals with a particle size less than 100 microns in diameter, molten solids, solids in solution, and solids with a National Fire Protection Association (NFPA) reactivity rating of 2, 3, or 4 were assigned a V equal to 1. If the EHS solid did

¹ Threshold Planning Quantities Technical Support Document, 4-7-87. Chemicals That Were Assigned Threshold Planning Quantities Different From the Calculated Index Value, 4-7-87. Reactive Solids Whose Threshold Planning Quantities Should Be Less than 10,000 Pounds, 4-7-87. Changes Made to Threshold Planning Quantities Between Proposed Rule and Final Rule, 4-7-87. Technical Support Document for Determination of Levels of Concern, 11-11-86.

not have a particle size less than 100 microns, was not molten or handled in solution form, and did not have an NFPA reactivity rating of 2, 3, or 4, then the EHS chemical was assigned a TPQ of 10,000 pounds, which corresponds to the highest index value. Solids with a NFPA reactivity rating of 2, 3, or 4 are denoted with an “a” in the Notes column of the EHSs list. For solids in molten form, before applying the TPQ, the amount of chemical on-site at any time is multiplied by an adjustment factor of 0.3 to conservatively account for the maximum volatilization of the spilled molten substance that is likely to take place.

3. Changes to EHS list and TPQs

EPA has since amended the EHSs list and deleted 51 chemicals. Ten chemicals were deleted based on the request of petitioners and the remaining 41 chemicals were deleted as a result of Agency review. The chemicals were deleted because they did not meet the toxicity criteria for the list and/or were originally listed in error. Petitions requesting the deletion of two chemicals, paraquat dichloride (which is discussed below) and isophorone diisocyanate have been denied. Isophorone diisocyanate was not deleted from the EHSs list because its inhalation toxicity met the EHSs listing criteria.

EPA has also changed the TPQs for some of the EHSs. In the April 22, 1987 final rule, EPA reduced the TPQs for 36 substances, while it raised the TPQs for 12 substances based on updated acute toxicity data. Since then, EPA has lowered the TPQ for muscimol because of a typographical error in a prior rulemaking; EPA has raised the TPQ for isophorone diisocyanate because it was mistakenly based on a physical state of reactive solid, when it is actually a liquid; and EPA has denied a petition to raise the TPQs for azinphos methyl and fenamiphos.

4. Petition for Paraquat Dichloride

Paraquat dichloride was originally listed as paraquat with a CAS No. 1910-42-5 on the final EHSs list. ICI Americas submitted a petition in October 1989 that requested the Agency to remove paraquat from the EHSs list or alternatively, revise the TPQ. On October 12, 1994 (59 FR 51816), EPA changed the listed chemical name from paraquat to paraquat dichloride to match the CAS Number and denied the petition to delete paraquat or modify the TPQ, because the inhalation toxicity of paraquat dichloride met the EHS listing criteria. Further explanation of EPA's rationale for denying the petition can be found in the October 12, 1994 final rule (59 FR 51816) and in the April 15, 2011 proposed rule (76 FR 21299) for modifying the application of TPQs for EHS solids in solution.

5. Zeneca's Request to Reconsider the Paraquat Dichloride Petition

In November 1999, Zeneca (formerly ICI Americas) requested that EPA reconsider either removing paraquat dichloride from the EHSs list or raising its TPQ. Zeneca claimed that the form of the chemical used in inhalation toxicity tests (temporarily atomized powder under laboratory conditions) is not relevant data to use for listing paraquat dichloride. Zeneca believed that it was highly unlikely that inhalable particles or vapors of paraquat dichloride could become airborne during an accidental release. Zeneca did not agree with the rationale EPA used to assign a TPQ of 10 pounds to paraquat dichloride, which is only manufactured, processed and used in solution form. Zeneca claimed that EPA did not explain why a greater potential for airborne dispersion for solids in solution exists as opposed to liquid chemicals.

On October 11, 2000, Syngenta (formerly Zeneca) filed an action in U.S. District

Court for the District of Columbia under the Administrative Procedures Act seeking judicial review of EPA's decisions regarding paraquat dichloride. In this complaint, Syngenta requested EPA to either delete paraquat dichloride from the EHSs list or raise its TPQ. In their complaint, Syngenta did not agree with EPA's rationale to assign a lower TPQ of 10 pounds to paraquat dichloride, which is only manufactured, processed and used in solution form. Syngenta also claimed that EPA did not explain why it assumed a greater potential for airborne dispersion for solids in solution, as opposed to liquid chemicals. In addition, Syngenta argued that paraquat dichloride solution is basically a non-volatile salt dissolved in water, and that the physical and chemical characteristics of many solids like paraquat dichloride limit their capacity to become airborne.

On January 23, 2003, EPA filed a Motion for Voluntary Remand in order to reconsider the petition. The court granted EPA's motion and dismissed Syngenta's complaint on January 31, 2003. By order of February 24, 2003, the court denied Syngenta's Motion to Amend Judgment. EPA again reviewed the request to delete paraquat dichloride and/or to raise its TPQ. In a November 21, 2003, letter to the petitioner, EPA reaffirmed its denial to delete paraquat dichloride from the EHSs list. EPA concluded that the acute toxicity of paraquat dichloride meets the criteria for listing it as an EHS chemical. In the same letter to the petitioner (available in the docket), however, EPA agreed to consider a revision to the TPQ for paraquat dichloride in the context of a proposed rule to amend the TPQ for all EHS chemicals handled as solids in solution.

E. Summary of Proposed Rule of April 15, 2011

In the proposed rule of April 15, 2011 (76 FR 21299), EPA proposed that facilities who are subject to the emergency planning notification requirements under section 302 of EPCRA, and who have a non-reactive solid EHS in solution on-site, should multiply the amount of the non-reactive solid chemical (in solution form) by 0.2 before determining if this reduced quantity equals or exceeds the lower published TPQ. This change was proposed based on data in the literature that shows less potential for non-reactive solid chemicals in solution to remain airborne beyond a facility's fenceline in the event of an accidental release. This change affects not just paraquat dichloride solution, but all EHS solid chemicals in solution, except reactive solids. The application of a reducing factor to the amount of non-reactive EHS solids in solution before comparison to its TPQ is similar to how facilities apply the TPQs for EHSs that are molten solids, except that for molten solids the factor is 0.3.² EPA also defined *solution* to be any aqueous or organic solutions, slurries, viscous solutions, suspensions, emulsions, or pastes.

However, this change will not apply to the 12 solid EHS chemicals that are reactive solids (denoted with "a" in the "Notes" column in Appendix A or B of 40 CFR part 355). Reactive solids are more likely than other solids to be dispersed into the air due to the energy or heat created from their reactivity with water or air. The explanation for not assigning a 10,000 pounds TPQ to each of the reactive solids is discussed in the document, "Reactive Solids Whose Threshold Planning Quantities Should Be Less Than 10,000 Pounds," April 7, 1987, which can be found in the docket to this rulemaking.

Previously, EPA had assumed that 100% of non-reactive EHS solid chemicals in

² The amount present on-site for EHSs that are in a molten form is calculated by multiplying the weight of the chemical by 0.3 to determine if the lower TPQ is met or exceeded.

solution could become airborne in the event of an accidental release. Review of the literature data for accidental releases of liquid aerosols shows that no more than 20% of the release is expected to remain airborne. The data is from a 1994 U.S. Department of Energy (USDOE) report ³ (available in the docket) on the airborne release fraction (ARF) from experimental liquid aerosol releases involving metal salt solutions for a wide variety of release scenarios. EPA based the 0.2 factor on the scenario with the highest release potential in order best to serve the purposes of emergency planning. A summary of the USDOE aerosol release scenarios with the highest ARFs are listed in a table in the April 15, 2011 proposed rule (76 FR 21299). A more detailed discussion, along with the alternative approaches considered, can be found in the April 15, 2011 proposed rule and in the “Technical Support Document for Revised TPQ Method for EHS Solids in Solution” in the docket for this rule.

EPA’s revised TPQ methodology for non-reactive EHS solids in solution and supporting data was peer reviewed and the technical support document was revised based on peer review comments. The results of the peer review and response to peer review comments are found in a separate document, “Peer Review of Technical Support Document for Revised TPQ Method for EHS Solids in Solution,” which is available in the docket to this rulemaking. A summary of the peer reviewer’s comments and EPA responses to them are presented in the April 15, 2011 proposed rule (76 FR 21299).

II. Summary of This Action

A. What is the Scope of This Final Rule?

³ DOE Handbook, *Airborne Release Fractions/Rates and Respirable Fractions for Nonreactor Nuclear Facilities*. December 1994. US Department of Energy, Washington DC 20585. DOE-HDBK-3010-94. Volume I- Analysis of Experimental Data and Volume II-Appendices.

This final rule revises the manner for applying the TPQ for the 157 non-reactive EHS chemicals that are handled as solids in solution. These 157 chemicals appear with two TPQs, (the higher TPQ is 10,000 pounds) in Appendix A and B of 40 CFR part 355. The 12 solid EHS chemicals that are reactive solids are noted by footnote “a” in Appendix A and B of 40 CFR part 355, and are not affected by this final rule. Definitions of reactive and non-reactive solids, which were explained in the preamble of the proposed rule, have also been added to the regulations in 40 CFR 355.61 for greater clarity.

Solid EHSs (except reactive solids) have a TPQ of 10,000 pounds or a specified lower TPQ, for particular forms. For purposes of complying with the emergency planning notification requirements of section 302 of EPCRA, facilities should multiply the amount of EHS chemical handled as a non-reactive solid in solution on-site by 0.2 before determining if this amount equals or exceeds the established lower TPQ. If the amount of the non-reactive EHS solids in solution on-site multiplied by 0.2 does not equal or exceed the lower TPQ for that solid EHS, then the facility is not subject to the EPCRA section 302 emergency planning notification requirements for that substance. This amount includes only the weight of the chemical and not the solvent or other chemicals in solution. The amount of non-reactive EHS solids in solution may be determined by multiplying the weight percent of the EHS solids in solution in a particular container by the weight of the total solution. Solutions include aqueous or organic solutions, slurries, viscous solutions, suspensions, emulsions, and pastes.

Additionally, EPA has also revised the regulations for 40 CFR 355.16 (c) to be applicable only to molten non-reactive solids. That is, the factor of 0.3 to be multiplied

by the amount of a molten solid on-site before comparing to the lower TPQ should only be used for non-reactive solids in molten form, not reactive solids in molten form.

Reactive solids are more likely to be dispersed into the air due to the energy or heat created from their reactivity with water or air and their TPQs were developed taking these factors into account.

Additionally, the methodology of applying TPQs for non-reactive EHS solids in solution or non-reactive molten solids does not affect the reporting requirements for sections 311 and 312 of EPCRA (40 CFR part 370). Regulations under 40 CFR 370.10 state that an EHS is present at a facility if the “amount of EHS present at any one time” is equal or greater than 500 pounds or the TPQ, whichever is lower. The reducing factor of 0.2 for non-reactive EHS solids in solution or (0.3 for non-reactive EHS molten solids) is not to be used for compliance with hazardous chemical reporting. Therefore, EPA has amended the text of 40 CFR 355.16 (b) and (c) to clarify that the reduction in quantity for the amount of non-reactive EHS solids in solution and for the amount of non-reactive EHS solid in molten form present at a facility does not apply for reporting requirements under 40 CFR 370.10, which covers MSDS and hazardous chemical inventory reporting. That is, facilities must not use the reduction in quantity on-site to determine the “amount present at one time” for reporting under 40 CFR 370.10.

The reason why the reducing factors are to be used for emergency planning notification under 40 CFR part 355 and not under hazardous chemical reporting under 40 CFR part 370 are explained below. Emergency planning notification under section 302 helps LEPCs identify those facilities whose accidental releases pose risks to the surrounding community so they can develop emergency plans that identify the location

and number of affected populations, evacuation or shelter-in-place procedures, etc. On the other hand, sections 311 and 312 of EPCRA require submission of MSDSs and an on-site inventory of hazardous chemicals to help emergency responders assess how to respond to an emergency release or fire. In particular, responders need the amounts, manner of storage and locations of the chemical on-site, the chemical and physical properties, hazard ratings, toxicity information and incompatibilities of the chemical, as well as measures needed to contain the spill or fire at the facility in order to know how to respond to an emergency. In addition, they need to know what type of protective equipment is needed to protect them from exposure, not only airborne, but also dermal exposure.

Emergency release notification requirements under EPCRA section 304 also are not affected by this final action. Section 304 requires facilities to notify the community emergency coordinator for the LEPC of any area likely to be affected by the release and the SERC of any area likely to be affected by the release (defined in 40 CFR 355.61) at or above the reportable quantity (RQ) of any EHS or CERCLA hazardous substance. If the chemical released is a CERCLA hazardous substance, the release must also be reported to the National Response Center (NRC). The RQ is not the same as the TPQ. TPQs are based on acute mammalian toxicity and potential for airborne dispersion. RQs, on the other hand, are developed using several criteria, including aquatic toxicity, mammalian toxicity, ignitability, reactivity, chronic toxicity, potential carcinogenicity, biodegradation, hydrolysis, and photolysis (50 FR 13468, April 4, 1985).

B. Applying a TPQ for an Non-Reactive EHS Solid in Solution

Facilities with a non-reactive EHS solid in solution should apply the 0.2 factor

only to the amount of EHS solid present, not the total weight of the solution. As an example, a facility has 4,000 pounds of a solution of 37% by weight paraquat dichloride on-site. Therefore, this solution contains 1,480 pounds of paraquat dichloride ($0.37 \times 4,000$ pounds). The facility would multiply 1,480 pounds by 0.2, which equals 296 pounds. This amount is then compared to the TPQ for paraquat dichloride, which is 10 pounds. Because this amount exceeds the 10 pounds TPQ, the facility is required to comply with the emergency notification requirements of section 302 of EPCRA. As another example, a facility has 10 gallons (gal) of a solution of 37% by weight paraquat dichloride on-site. The density of the solution is 9.33 pounds per gallon. Therefore, this solution contains 34.5 pounds of paraquat dichloride ($10 \text{ gal} \times 9.33 \text{ lb/gal} \times 0.37$). The facility would multiply 34.5 pounds by 0.2, which equals 6.9 pounds. This amount is then compared to the TPQ for paraquat dichloride, which is 10 pounds. Because this amount is less than the 10 pounds TPQ, the facility is not required to comply with the emergency notification requirements of section 302 of EPCRA.

Facilities that handle both the powdered and solution forms of a particular non-reactive solid EHS will have to consider the quantities of each form and the particle size to determine whether they exceed a TPQ. Below are several examples of how to apply the revised TPQ methods in various cases.⁴

Non-reactive solid in solution exceeds lower TPQ, powder below 10,000 pounds. A facility has on-site 5,000 pounds of a pure EHS powder with a particle size equal to or greater than 100 microns, which is less than the 10,000 pounds TPQ.

However, they also have 1,000 gallons of a 35% by weight non-reactive EHS solid in

⁴ For these examples, the EHS is not paraquat dichloride, but an unspecified non-reactive solid EHS that has a lower TPQ of 500 pounds and a higher TPQ of 10,000 pounds.

solution with a density of 9 pounds per gallon. The amount of solids in solution on-site is 3,150 pounds (1000 gallons x 9 pounds per gallon x 0.35). Multiplying the 3,150 pounds of solid in solution by 0.2 equates to 630 pounds, which exceeds the lower TPQ of 500 pounds. Thus, the facility must report under section 302 of EPCRA based on exceeding the lower TPQ for the non-reactive solid in solution form.

Non-reactive solid in solution below lower TPQ, powder exceeds 10,000

pounds. A facility has on-site 11,000 pounds of a pure EHS solid powder with a particle size equal to or greater than 100 microns, which is more than the 10,000 pounds TPQ. They also have 2,000 gallons of a 10% by weight non-reactive EHS solid in solution with a density of 9 pounds per gallon. The amount of solids in solution on-site is 1,800 pounds (2,000 gallons x 9 pounds per gallon x 0.10). Multiplying the 1,800 pounds of solid in solution by 0.2 equates to 360 pounds, which is less than the lower TPQ of 500 pounds. Thus, the facility must report under section 302 of EPCRA based on exceeding the 10,000 pounds TPQ for the solid in powder form.

Non-reactive solid in solution below lower TPQ, powder below 10,000

pounds. A facility has 5,000 pounds of a pure EHS solid powder with a particle size equal or greater than 100 microns, which is less than the 10,000 pounds TPQ. They also have 1,500 gallons of a 15% by weight non-reactive EHS solid in solution with a density of 9 pounds per gallon. The amount of solids in solution on-site is 2,025 pounds (1,500 gallons x 9 pounds per gallon x 0.15). Multiplying the 2,025 pounds of solid in solution by 0.2 equates to 405 pounds, which is less than the lower TPQ of 500 pounds. Thus, the facility is not required to report under section 302 of EPCRA because it does not exceed the lower 500 pounds TPQ for the non-reactive solids in solution form or the 10,000

pounds TPQ for the powder with a particle size greater than 100 microns.

Powdered product less than 100 microns, processed into solution. If the same amount of solid EHS powder were involved as the same scenarios above, except the powder has a particle size less than 100 microns, then the lower 500 pounds TPQ would apply to the powder instead of 10,000 pounds. If either the amount of powder or non-reactive solids in solution exceeds the lower TPQ, the facility would be required to report under section 302 of EPCRA.

III. Response to Comments on April 15, 2011 Proposed Rule

EPA received comments from three organizations. The number of commenters in each group is as follows: Industry, 1 comment; and LEPCs, SERCs (or TERCs) and Emergency Management Agencies (EMAs), 2 comments. A complete summary of all comments and EPA's response to them is presented in "Response to Comments for Emergency Planning and Community Right-to-Know Act; Emergency Planning and List of Extremely Hazardous Substances and Threshold Planning Quantities," which is available in the docket. The major issues and the Agency's responses to them are described below

A. Comments Supporting the Changes

Comment: One commenter believed that the proposed method better reflects the ability of a solid substance becoming airborne. They also support not changing the EPCRA section 304 reportable quantities for EHSs.

EPA's Response: We agree with the commenter, as it relates to non-reactive solids in solution. However, EPA emphasizes that the changes proposed (and finalized today) apply only to non-reactive EHS solids in solution, not other solid forms, such as

powdered solids. EHSs that are powdered solids with a particle size of less than 100 microns diameter are considered to be as dispersable in air as a gas and are subject to the lower listed TPQ in Appendix A or B of 40 CFR part 355. On the other hand, EHSs that are powdered solids with a particle size equaling or exceeding 100 microns in diameter are subject to the higher TPQ of 10,000 pounds.

Comment: Another commenter supported the proposed method because they believe the changes can benefit SERCs and LEPCs to allow them to better focus their limited resources on those amounts of EHSs that will potentially cause the greatest harm. The commenter also thought the proposal was consistent with Executive Order 13563, which promotes that “analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned (76 FR 3822, January 21, 2011).

EPA’s Response: We agree with the commenter that the revised methodology better aligns the regulatory requirements with the best available science. That is, the additional experimental data on aerosol releases refines the applicability and development of TPQs for non-reactive EHS solids in solution because it provides a sounder scientific basis for assigning TPQs, and thereby, more accurately identifies the forms of solid chemicals that would pose the greatest risks if accidentally released. We also agree with the commenter that the EHSs list and assigned TPQs are intended to help communities focus on the substances and facilities of most immediate concern for emergency planning and response.

With respect to E.O. 13563: Improving Regulation and Regulatory Review, EPA did not address the application of this Executive Order in the proposed rule because OMB

review of this action had just been completed before the Executive Order was issued in January 2011. However, the Agency did include the revisions for the application of TPQs for EHS non-reactive solids in solution in its report to OMB, “Final Plan for Periodic Retrospective Reviews of Existing Regulations” (the Plan) in response to President Obama’s charge in Executive Order 13563 for each federal agency to develop a plan for reviewing existing regulations. EO 13563 requires the agency to “periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

B. Comments Supporting the Changes With Questions

Comment: The commenter notes that the proposed rule states that a facility determines the quantity of EHSs “present” for solids in solution by multiplying the weight percent of non-reactive solids in solution in a particular container by the total weight of solution in the container, multiplied by 0.2. Under 40 CFR 370.30, a facility must submit an MSDS for each hazardous chemical “present” at the facility that meets or exceeds the applicable threshold level. Under the new proposal, it appears the facility may report on the calculated amount under the proposed regulation, thus changing the Tier II threshold without any discussion or analysis. The commenter strongly urges that the language of the proposed regulation address this ambiguity directly and clarify its relationship to EPCRA section 312. The commenter suggests the following language be added to the proposal in 40 CFR 355.16(b): This reduction in quantity does not apply to determining the threshold for reporting under 40 CFR 370.10.

EPA's Response: EPA agrees with the commenter that application of TPQs for emergency planning and for hazardous chemical reporting should be clarified in the regulations to make it clear that the reducing factor is not used for compliance with the hazardous chemical reporting requirements under 40 CFR 370.10. (See Section II.A of the preamble to today's final rule for further discussion on this point.) However, rather than say the reduction in quantity does not apply in determining the TPQ ("the threshold" as stated by commenter), EPA has amended 40 CFR 355.16(b) by stating that this reduction in quantity must not be used to determine the amount present at one-time at a facility for reporting under 40 CFR 370.10. That is, EPA sets the TPQs, but facilities must determine the amount present to compare to the threshold.

EHS solids in molten form also have a reducing factor (0.3) applied to the amount on-site before comparing with the TPQ. Therefore, EPA has revised the regulation in 40 CFR 355.16 (c) to also clarify that this reducing factor must not be used to determine the amount present at one-time at a facility for reporting under 40 CFR 370.10, which covers hazardous chemical reporting. EPA has also revised 40 CFR 355.16(c) to limit the application of the 0.3 reducing factor to be used only for non-reactive solids in molten form, not for reactive solids in molten form. Definitions of reactive and non-reactive solids, while explained in the preamble of the proposed rule, have also been added to the regulations in 40 CFR 355.61 for greater clarity.

C. Comments Opposing the Changes

Comment: One commenter was concerned with the effect that the proposed rule will have on a community's ability to know if a hazardous substance is present and prepare for a possible emergency. The proposed regulation only considers a release

scenario where a non-reactive EHS solid in solution form is released via an airborne release. However, LEPCs and Fire Departments have to look at all possible scenarios, including a possible fire or spill to water. If there is any type of emergency, the Fire Department will have to react to the total quantity on hand. While there is a great deal of information in the administrative record regarding the behavior of airborne releases of the subject materials, none of that information suggests that these materials are harmless in other accident scenarios.

EPA's Response: EPA recognizes that the manner in which the TPQs for non-reactive EHS solids in solution are being applied does not address all environmental media that could be affected by an accident release and EPA agrees that materials released via other accident scenarios are not harmless. However, the development of TPQs for emergency planning purposes under section 302 of EPCRA addresses the air release scenario because EPA believes an air release is most likely to involve potential exposures to the surrounding community. This air release scenario was used to develop TPQs for all EHSs whether they were gases, liquids, or solids. EPA is only modifying the approach for non-reactive EHS solids in solution to reflect the scientific information now available, which shows that an assumption of 100% dispersion into the air beyond a facility's fence line affecting the surrounding community is overly conservative.

The TPQs are designed to help State and local officials identify those sites where there is a greater potential for harm to the surrounding community if a release were to occur, thereby focusing resources on priority emergency planning problems (51 FR 41577, November 17, 1986.) The approach used for setting TPQs under section 302 of EPCRA ranks chemicals based on ambient physical state, form and the extent to which

the material can become airborne and dispersed. This approach provides a relative measure of concern rather than absolute values and EPA acknowledged when developing the TPQs that there is no precision associated with the numbers and they should not be construed as “safe” (51 FR 41577, November 17, 1986). When the TPQs were initially developed, EPA considered an approach based on ranking the chemicals on toxicity alone without considering the potential for them to become airborne, but this approach was rejected because it might distort local planning priorities (see 51 FR 41577, November 17, 1986 for further discussion on this point). The Agency believes that limited state and local resources should be focused on those substances that potentially cause the greatest harm should an accidental release occur (52 FR 13390, April 22, 1987).

Nevertheless, EPA recognizes that Fire departments will need to react to the entire quantity on-site. Therefore, the reduction of the amount on-site of a non-reactive EHS solid in solution is only allowed for emergency planning purposes under section 302 of EPCRA and is not to be used for reporting under sections 311 and 312 of EPCRA. Accordingly, fire departments will have all the same information as before for planning and responding to an accidental release. LEPCs also have access to the same information for planning purposes.

Comment: One commenter was concerned that the proposed change is a unique approach to evaluating EHS chemicals and is foreign to LEPCs, fire departments and SERCs. For other EHSs, it is not necessary to carry around a calculator to evaluate whether the visually obvious quantity being stored is actually in excess of the TPQ. For all other EHS chemicals, looking at the MSDS and knowing the quantity on hand suffices.

EPA's Response: The approach being finalized today, which revises the manner for applying TPQs for non-reactive EHS solids in solution is not "unique"; rather, EPA has already used a similar approach for determining the manner for applying TPQs for molten solids (except that the amount on-site is multiplied by 0.3). When proposing such an approach for molten solids, the Agency received no feedback from LEPCs, fire departments or SERCs (or TERCs) that applying this approach is problematic. In addition, we would note that quantities of EHSs that are stored as mixtures (such as solutions) already require some calculation of the total quantity of mixture multiplied by the concentration to determine the pounds of pure EHS (see 40 CFR 355.13). Adding up various containers and sources of the stored EHSs within a facility requires calculation and is already required (see 40 CFR 355.14). Some calculations for emergency planning should be expected and EPA does not believe a further calculation for comparison to a TPQ is unnecessarily burdensome. In addition, as noted elsewhere in this preamble, the Hazardous Chemical Inventory reports provide the total quantities and locations for use by emergency planning and response groups, and thus, we believe the information that LEPCs and Fire Departments need will still be available to them for emergency planning purposes.

Comment: One commenter was concerned about the burden being balanced in this situation: a one-time notice versus the annual or even more frequent effort by the LEPC and fire department to evaluate risks present in the community. The commenter believes that a release of these chemicals is hazardous and undoing 25 years of information collection and emergency planning just so a one-time notice can be avoided, seems absurd.

EPA's Response: EPA believes that because most facilities have (or should have) already reported the presence of EHSs exceeding relevant TPQs to their LEPCs, it is not apparent how this change in requirements will require more frequent effort by LEPCs and fire departments to evaluate risks. The data already collected by LEPCs, fire departments and SERCs (or TERCs) is still available and reporting on hazardous chemicals "aids in the development of state and local emergency plans" (40 CFR 370.1). If an LEPC believes that unreasonable risks are still posed for an EHS present at a facility, section 302 (b)(2) of EPCRA allows a Governor or SERC to designate additional facilities after public notice and comment to be subject to the emergency planning and notification requirements of section 302 of EPCRA. In addition, facilities are still subject to emergency planning notification if they handle other EHSs that exceed their TPQs.

We would also note that EPA did not make this change in reporting just so a one-time notice could be avoided. The issue was initially addressed due to a lawsuit that challenged, among other things, that EPA did not adequately explain the basis for setting the TPQs for non-reactive EHS solids in solution and did not adequately explain why it thought that such solids in solution could be expected to be completely dispersed into the air, as compared to gases or powdered solids. EPA now believes, based on the studies cited in its technical analysis, that the previous assumption that a release of a non-reactive EHS solid in solution would be as readily dispersed to air as a gaseous EHS, for example, was overly conservative and without a good basis.

Finally, for all practical purposes, changing the notification requirement affects only those facilities who have not yet reported a non-reactive EHS solid in solution. Thus, EPA believes that this change will allow those planning agencies with limited

resources to better focus their efforts on those forms of EHSs that are more likely to cause the greatest harm. EPA also acknowledges that non-reactive EHS solids in solution can be hazardous, but notes that the requirements of EPCRA section 302 do not apply to all hazardous chemicals, only a subset, such as the limited listing of EHS.

Comment: One commenter noted that EPA suggested in the proposed rule that Tier II reports will still provide adequate information to LEPCs and fire departments. The commenter stated that the authority of EPCRA section 303(d)(3) does not apply to Tier II reports, which will immediately deprive LEPCs of perhaps their greatest asset in emergency planning.

EPA's Response: EPA agrees that the authority of EPCRA section 303(d)(3) [42 U.S.C. § 11003 (d)(3)] does not apply to Tier II reports. Section 303(d)(3) requires that for each facility subject to the requirements of *Subchapter I- Emergency Planning and Notification*, the owner or operator of the facility shall promptly provide information to such committee necessary for developing and implementing the emergency plan, upon request from the emergency planning committee. Tier II Inventory reporting requirements are covered under *Subchapter II- Reporting Requirements* of EPCRA [42 U.S.C §§ 11021-11023].

EPA believes that less priority can be given for these forms of chemicals—that is, a non-reactive EHS solid in solution, based on the data that indicates they are not expected to be as dispersed into the air in the event of an accident. Other EHSs (such as gases and volatile liquids) are in a physical state and form more likely to cause potential risks to off-site communities when released. Facilities are still covered under section 302 of EPCRA if they have other EHSs that exceed the TPQs and thus, may still be required

to provide some information relevant for emergency planning. Also, for purposes of emergency planning, section 302(b)(2) of EPCRA does allow a governor or a SERC to designate additional facilities to be subject to emergency planning and notification requirements, if such designation is made after public notice and opportunity for comment.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Rather, this final rule raises the amount of chemical on-site required before triggering emergency planning reporting under 40 CFR part 355 for non-reactive EHS solids in solution. Facilities with this form of EHS chemical would have already (or should have already) reported their presence to their SERC (or TERC) and LEPC and identified a Facility Emergency Coordinator and necessary information for development of a local emergency plan to their LEPC. If, as a result of this rulemaking, facilities find that they have a non-reactive EHS solid in solution on-site which no longer equals or exceeds the TPQ, the facility should notify their LEPC. Section 303(d)(2) of EPCRA requires facilities to promptly provide to their LEPC any changes relevant to emergency planning.

Regulations at 40 CFR 355.20 clarify that relevant changes to emergency planning

should be reported within 30 days. EPA expects that this notification will be a minimal burden. The emergency planning notification requirement is not required annually. There may be a slight burden reduction for facilities that are reporting non-reactive EHS solids in solution for the first time under the EPCRA section 302 requirements.

The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 355 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2050-0092, EPA ICR number 1395.07. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's final rule on small entities, a small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the rule on small entities" 5 USC 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This final rule changes the manner by which facilities apply the TPQs for those non-reactive EHSs that are solid chemicals in solution form. Specifically, facilities with a non-reactive EHS solid in solution would be subject to the Emergency Planning requirements of 40 CFR part 355, subpart B- Emergency Planning only if the amount of non-reactive EHS solids in solution on-site, multiplied by 0.2 equals or exceeds the lower published TPQ. We have therefore concluded that today's final rule will relieve regulatory burden for some affected small entities and will have no economic impact on the rest of the affected small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532-1538 for state, local, or tribal governments or the private sector. This action does not impose any new requirements on state, local or tribal governments. Facilities currently with non-reactive

EHS solids in solution on-site have already (or should have already) reported these chemicals to their SERC (or TERC) and LEPC and identified a Facility Emergency Coordinator and the necessary information for developing an emergency plan to their LEPC. We expect that this action will neither increase nor decrease the requirements for SERCs (or TERCs) or LEPCs. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action does not impose any new requirements on state, local or tribal governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

This action reduces the reporting burden on any facilities that would have a non-reactive EHS solid in solution on-site for the first time and could be subject to the emergency planning requirements for that chemical under 40 CFR part 355, subpart B-Emergency Planning. We also expect that this action will neither increase nor decrease the requirements for SERCs (or TERCs) or LEPCs. This rule does not impose any requirements on state or local governments. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal

Governments

This action does not have tribal implications, as specified in Executive Order 13175, (65 FR 67249, November 9, 2000). This action reduces reporting burden on any facilities that would have a non-reactive EHS solid in solution on-site for the first time and could be subject to the emergency planning requirements for that chemical under 40 CFR part 355, subpart B- Emergency Planning. This action also does not impose any new requirements on tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866 and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action reduces the reporting burden on any facilities that would have a non-reactive EHS solid in solution on-site for the first time and could be subject to the emergency planning requirements for that chemical under 40 CFR part 355, subpart B- Emergency Planning.

H. Executive Order 13211: Energy Effects

This action is not a “significant energy action,” as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Rather, this final rule would reduce reporting burden on any facilities that would have a non-reactive EHS solid in solution on-site for the first time and could be subject to the emergency planning requirements for

that chemical under 40 CFR part 355, subpart B- Emergency Planning.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or would otherwise be impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations of when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. That is, based on new information and data, the Agency believes that the amount of non-reactive EHS solids in solution that would remain airborne from an accidental release into the environment will be lower than previously considered, and thus, would have less impact on the local community. This in turn will allow SERCs (or TERCs) and LEPCs to better focus their attention and limited resources on the amounts of EHS chemicals that can potentially cause the greatest harm, including those affecting minority or low-income populations, and to spend less time and fewer resources on those that pose less harm, when released.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective **[insert date 30 days after publication in the Federal Register]**.

List of Subjects in 40 CFR Part 355

Environmental protection, Air pollution control, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: March 15, 2012

Lisa P. Jackson,

Administrator

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 355--EMERGENCY PLANNING AND NOTIFICATION

1. The authority citation for part 355 continues to read as follows:

Authority: Sections 302, 303, 304, 325, 327, 328, and 329 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11002, 11003, 11004, 11045, 11047, 11048, and 11049).

2. Section 355.16 is amended by revising paragraphs (b) and (c) to read as follows:

§ 355.16 How do I determine the quantity of extremely hazardous substances present for certain forms of solids?

* * * * *

(b) *Solid in solution.* Multiply the weight percent of the non-reactive solid in solution in a particular container by the total weight of solution in that container. Then multiply by 0.2.

Note to paragraph (b): This reduction in quantity must not be used to determine the amount present at one-time at a facility for reporting under 40 CFR 370.10.

(c) *Solid in molten form.* Multiply the weight of the non-reactive solid in molten

form by 0.3.

Note to paragraph (c): This reduction in quantity must not be used to determine the amount present at one-time at a facility for reporting under 40 CFR 370.10.

3. Section 355.61 is amended by adding in alphabetical order the definitions of “Non-reactive Solid”, “Reactive solid” and “Solution” to read as follows:

§ 355.61 How are key words in this part defined?

* * * * *

Non-reactive solid means any substance listed in Appendix A or B of this part with two threshold planning quantity values, the higher TPQ being 10,000 pounds.

* * * * *

Reactive solid means any extremely hazardous substance denoted with “a” in the “Notes” column in Appendix A or B of this part.

* * * * *

Solution means any aqueous or organic solutions, slurries, viscous solutions, suspensions, emulsions, or pastes.

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